Supreme Court, U.S.
FILED

991727 JAN 28 2000

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No.

In the

Supreme Court of the United States

TERESA ANN GATES,

Petitioner,

versus

FORREST GENERAL HOSPITAL, VICKI FERNICOLA PEVSNER,

Individually and Officially

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED REVIEW

Is Summary Judgment appropriate in an Age Discrimination case when it has been conceded by the Lower Court itself that a *prima facie* case has been established?

When it has been conceded by the Lower Court that certain "speech" is entitled to First Amendment Protection, if one is not immediately terminated for the speech, but one is immediately treated by her employer to a hostile, abusive work environment, is one entitled to relief pursuant to 42 U.S.C. Section 1983?

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Petitioner, Teresa Ann Gates, respectfully requests that the Court grant a Writ of Certiorari to review the *en banc* decision of the United States Court of Appeals for the Fifth Circuit.

DECISIONS BELOW

The unreported decision of the Fifth Circuit of the United States Court of Appeals is set forth in the appendix, (1a). The U.S. Court of Appeals for the Fifth Circuit, on November 3, 1999 denied Ms. Gate' Petition for Rehearing and Rehearing En Banc. That decision is also unreported. The original decision rendered matter in the United States District Court for the Southern District of Mississippi is also unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. On May 11, 1998, the Southern District Court of Mississippi, Hattiesburg Division, granted Summary Judgment. A timely appeal was filed in the Fifth Circuit in the United States Court of Appeals. The Fifth Circuit affirmed the Decision. Both a panel hearing and rehearing en banc were timely requested. The rehearing was denied on November 3, 1999. This petition was timely filed within 90 days of the panel rehearing denial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Age Discrimination Employment Act (A.D.E.A) [29 U.S.C. Section 623 (a)]

"It shall be unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . .

42 U.S.C. Section 1983

Section 1 of the Civil Rights Act of 1861, 42.U.S.C. Section 1983, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and the laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress . .

First Amendment of the United States Constitution

Religious and Political Freedom

Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government or a redress of grievance.

STATEMENT OF THE CASE

Petitioner, Ms. Teresa Ann Gates, was an employee of Forrest General Hospital (Hospital) when she spoke out about public

concern regarding patient abuse at the Hospital as well as supervisors literally having sexual relations on the premises of the hospital. This matter also involves blatant age discrimination essentially because it involves "direct evidence" of discrimination in that Ms. Gates was specifically told by her supervisor that the hospital "wished to hire a YOUNGER person for less money."

Upon Ms. Gates' complaining about the patient abuse and the inappropriate sexual actions on the premises of the hospital, she was promised "dire consequences" immediately. Then, in a pattern and practice of mistreatment of her by her supervisors, she was consistently harassed, embarrassed, humiliated, and mistreated. It is not disputed that the actual quality of Ms. Gates work was exemplary.

Ms. Gate's function at the hospital essentially consisted of supervising teachers, planning educational programs, marketing hospital resources, and, in particular, marketing the "Pine Grove facility" which provided, among other things, psychological counseling.

As soon as Ms. Gates reported the wrongdoing regarding patient abuse and complaining about her supervisors having sexual relations on the premises, one of her supervisors, Ms. Pevsner, did all that she could to have Ms. Gates quit. However, Ms. Gates "hung in" and did not quit.

Ultimately, Ms. Gates was replaced by a substantially younger woman who was 33 years old. Ms. Gates was over the age of 50 at the time she was constructively discharged. It is not disputed by the hospital that Ms. Gates was, at least, as qualified as her replacement.

Ultimately, Ms. Gates was told that the hospital wanted a "younger person". Then, Ms. Gates hours were reduced to the point

that she could not support herself, and she was compelled to resign. Consequently, she was constructively discharged.

The Defendants had one contention in response to the contentions of Ms. Gates: the Defendants contended that Ms. Gates would not work 12 months. Ms. Gates has consistently disputed this. She disputes it to this day.

In Ms. Gates complaint, she contended that she has been deprived of her employment for exercising her First Amendment Rights and, therefore, she is entitled to relief pursuant to 42 U.S.C. Section 1983. Furthermore, she sought relief pursuant to the Age Discrimination Employment Act (A.D.E.A.) because she was specifically told that she was the victim of age discrimination in that the hospital wanted to hire "a younger person". She was replaced by a person substantially younger than her.

Subsequently, the District Court granted Summary Judgment on May 11, 1998. On June 23, 1998 her Motion for Reconsideration was denied.

Upon an appropriate appeal being perfected, on September 24, 1999 the three Judge panel of the Fifth Circuit of the United States Court of Appeals affirmed the decision of the Lower Court .

On November 3, 1999, the Fifth Circuit also denied Ms. Gates Petition for Rehearing and her Petition for Rehearing En Banc.

The petitioner has filed a Petition for Certiorari to the United States Supreme Court based upon the issues and argument presented herein.

REASONS FOR GRANTING THE WRIT

I.

I. IS SUMMARY JUDGMENT APPROPRIATE IN AN AGE DISCRIMINATION CASE WHEN IT HAS BEEN CONCEDED

BY THE LOWER COURT ITSELF THAT A PRIMA FACIE CASE HAS BEEN ESTABLISHED?

The standards applied in the Circuits are conflicting as those standards pertain to *Title VII* discrimination matters. The burden is simply too heavy for a complaining party in a discrimination case to survive a Motion for Summary Judgment. This is especially true in the Fifth Circuit.

The Federal Rules of Civil Procedure are very clear. The only requirement to survive a Motion for Summary Judgment is simply that there be a genuine of issue of material fact. See Rule 56 Federal Rules of Civil Procedure (F.R.C.P.). Yet, that burden has become much heavier in the Fifth Circuit. For example, the Fifth Circuit readily acknowledges here that Ms. Gates established a *prima facie* case, and she "has produced sufficient competent Summary Judgment evidence to establish a *prima facie* case, albeit controverted by deposition testimony of the Defendants, of age discrimination relative to her discharge from that position in September 1996." (p. 2 a of appendix 1). The Court acknowledged the following: 1. Gates was discharged; 2. she was qualified for the position; 3. she was within the protected class at the time of discharge (over 40 years of age) and 4. she was replaced (i) by someone outside the protected class (ii) by someone who was younger.

Additionally, Ms. Gates also offered evidence that she was specifically told by her immediate supervisor that the hospital wanted " someone younger at a lower salary to replace her".

In spite of the foregoing, according to the Fifth Circuit, Ms. Gates is not even entitled to present her case to the Finder of Fact. The Fifth Circuit essentially held that a "reasonable jury" would not find in favor of Ms. Gates.

Consequently, if this case is allowed to stand, especially with "direct evidence" of discrimination, the Fifth Circuit, and all of the

district courts it embraces, have essentially unfettered, unbridled discretion to wipe away discrimination complaints and conclude arbitrarily, that a "reasonable jury" would find this or that. This position contradicts the directives of the Federal Rules of Civil Procedure at Rule 56 as well as, essentially speaking, the Due Process Clause of the United States Constitution which provides that there be a meaningful notice and a meaningful hearing regarding one's complaints -- particularly when one's complaints deal with whether one has been provided equal protection under the laws and whether *Title VII* has been violated.

The other Circuits do not agree with the Fifth Circuit. For example, the Second Circuit only requires a "de minimis burden." Dister v. Continental Group Co. Inc., 859 F 2d 1108, 1114 (2nd Cir. 1988). The Second Circuit standard defines the trial Court's task at the Summary Judgment Motion stage as being "carefully limited to discern whether there are any genuine issues of material fact to be tried, not to deciding them." Gallo v. Prudential Srvs., 22 F 3d 1219, 1224 (2nd Cir. 1994).

As the Second Circuit stated in Dister, upon referring to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986), the actual requirement which emanates from this Court, is that there only be "concrete evidence from which a jury **could return** a verdict in his favor." Now, the Fifth Circuit appears to have steered away from that standard. Surely, if a Trier of Fact hears evidence which, point blank, establishes age discrimination if believed by the Trier of Fact, it is literally impossible to conclude that a Trier of Fact "could not" conclude that age discrimination was a contributing factor to the treatment and termination of Ms. Gates.

The Fourth Circuit requires that the complainant should be given "the benefit of all permissible inferences; it is the jury's job at trial to weigh the evidence, not the Courts' business to do so at Summary Judgment." Tuck v. Henkel Co., 973 F 2d 371, 377 (4th

has also stated that "Courts must take special care when considering a Motion for Summary Judgment in a discrimination case because motive is often the critical issue." Evans v. Technologies Applications & Serv. Co., 80 F 3d 954, 958, (4th Cir. 1996).

The Seventh, Eighth and Tenth Circuits have all held that "credibility assessments are inappropriate at Summary Judgment." EEOC v. United Parcel Serv., 94 F. 3d 314, 319-20 (7th Cir. 1996); Oldham v. West, 47 F. 3d 985, 988-89, (8th Cir. 1995); Tomsic v. State of Riviera Beach, 85 F. 3d 1472, 1478 (10th Cir. 1996).

In the Eleventh Circuit, the only real question is whether a fact question existed. Lyes v. City of Riviera Beach, 126 f. 3d 1380, 1386 n. 11 (11th Cir. 1997).

The District of Columbia Circuit also has held that the Fact Finder must answer comparative credibility questions regarding discrimination. Aka v. Washington Hosp. Ctr., 116 F 3d 876 (D.C. Cir. 1997).

Here, we have: direct evidence, a *prima facie* case, numerous age - related comments by her supervisor, and she was replaced by a much younger woman who was clearly less qualified than her. Yet, Plaintiff is not allowed to present her case to a jury. We submit that the Summary Judgment standard utilized here conflicts with the appropriate standards emanating from the Supreme Court and the other Circuit Courts.

II.

WHEN IT IS CONCEDED BY THE LOWER COURT THAT CERTAIN "SPEECH" IS ENTITLED TO FIRST AMENDMENT PROTECTION, IF ONE IS NOT IMMEDIATELY TERMINATED FOR THE SPEECH, BUT ONE IS IMMEDIATELY TREATED BY HER EMPLOYER TO A HOSTILE, ABUSIVE WORK ENVIRONMENT, IS

ONE ENTITLED TO RELIEF PURSUANT TO 42 U.S.C. SECTION 1983?

The Hospital agreed that the Federal Court also had jurisdiction pursuant to 42 U.S.C. Section 1983. As this Court is keenly aware, a state entity such as the hospital, can not act "under color of state law" and deprive a Plaintiff of a Right guaranteed by the United States Constitution or by Federal statutes. If this occurs, of course, 42 U.S.C. Section 1983 is violated. Here, Ms. Gates reported brutal patient abuse on the premises of the hospital and was repeatedly threatened with "dire consequences" by her supervisor in regard to her reports, complaints, and concerns. She was fired for two reasons: the first was her age, and secondly, she exercised her First Amendment Rights. Her evidence essentially consisted of her direct supervisor threatening her with "dire consequences" by her continuing to complain about the patient abuse and then those "dire consequences" were realized by an immediate long course of harassment which was designed to force her to quit. The two other ladies who also complained about the patient abuse immediately quit. However, Ms. Gates managed to withstand the harassment until it became unbearable. Thus, she established a constructive discharge situation. Bourque v. Powell Elec. Mfg. Co., 617 F. 2d 61 (5th Cir. 1980).

The predominant case regarding this issue appears to be this Court's ruling in Connick v. Myers, 461 U.S. 138 (1983). Connick essentially states that an employee who speaks out about matters of "public concern" is entitled to First Amendment guarantees. Id. at p. 146. In the following cases the Court has consistently held that an employee who is fired or punished for the exercise of First Amendment Rights has lost "liberty" without due process of law. Pickering v. Board of Education, 391 U.S. 563 (1968), Perry v. Sindermann, 408 U.S. 593 (1972), Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 272 (1977).

In spite of the foregoing, the Fifth Circuit stated essentially that, since Ms. Gates did not immediately quit, she was not entitled to any relief. She was not even entitled to present her case to the Finder of Fact. This ruling appears to be in conflict with the considerable body of law, established supra, regarding this issue.

Here the "dire consequences" included being moved from her position, reducing her pay, throwing her desk contents into a hallway, being habitually screamed at by her supervisor, and castigated on a daily basis. The Fifth Circuit concluded that, although "Ms. Gates criticism of hospital co- employees for patient abuse and sexual misbehavior was "protected" speech, she must also produce reasonably probative evidence that her speech caused the retaliatory employment decision about which she complains. (p.5a, Appendix A). Jones v. Collins, 132 F 3d 1048, 1053 (5th Cir. 1998).

Once again, speaking metaphorically, if a supervisor tells you she is going to shoot you, and then she shoots you, the standard of "reasonable probative evidence" must be impossible to attain. Ms. Gates was promised "dire consequences" and certainly received "dire consequences". Yet, since she was not actually fired or constructively discharged until later, thanks to her own grit and determination, the Fifth Circuit informs that she is entitled to no relief and can not present her case to a Finder of Fact.

This ruling conflicts with the foregoing authorities, and we respectfully ask that this Court consider it anew.

CONCLUSION

The Court should grant *Certiorari* to review this important matter and reverse the Fifth Circuit Court of Appeals. The Petitioner respectfully asks that this Honorable Court clarify that, in a *Title VII* case and in any case involving issues of intent, especially when a prima facie case has undisputedly been established, the Trier of Fact

should have the opportunity to render the final disposition regarding the matter at hand.

Respectfully Submitted,

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APPENDIX A– OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60451

Theresa Ann Gates,

Plaintiff - Appellant,

v.

Forrest General Hospital; Vicki Fernicola Pevsner, Individually and Officially

Defendants - Appellee

Appeal from the United States District Court
For the Southern District of Mississippi

Submitted: _____

Filed: _____

Before REAVLEY, HIGGINBOTHAM, and DENNIS, Circuit Judqes. PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5THCIR. R. 47.5.4.

Appendix A

Theresa Gates appeals the district court's grant of summary judgment for the defendants dismissing with prejudice her claims under the Age Discrimination Employment Act (ADEA) and under 42 U.S.C. § 1983 for deprivations of First Amendment (free speech) and

I.

Fourteenth Amendment (liberty and property interests) protections. The claims arise from alleged adverse employment actions taken by the defendant employer Forrest General Hospital and the defendant supervisor Vicki Pevsner.

Having fully reviewed the briefs and the record and having heard oral argument by the parties, we affirm for substantially the reasons expressed by the district court in its memorandum opinion and order dated May 11, 1998, except for several elements with which we disagree that do not amount to reversible error.

With respect to the ADEA claims, in order to establish a prima facie case of age discrimination, Gates must demonstrate that she (1) was discharged; (2) was qualified for the position; (3) was within the protected age class -- over 40 -- at the time of discharge; and (4) was replaced by a younger person, or a person outside the protected age class, or otherwise was discharged because of her age. See Stults v. Conoco, Inc., 76 F.3d 651, 656 n.2 (5th Cir. 1996).

First, appellant's age discrimination claim that she was discharged in May 1996 from her position as Education Coordinator is without merit, as the district court properly found. Because only a small part of her duties as Education Coordinator were assigned to another employee already performing other duties as Therapy Coordinator, appellant

cannot be considered as having been replaced by another employee. See Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir.), cert. denied, 498 U.S. 878 (1990)(a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties).

Second, regarding the ADEA claim premised upon appellant's alleged discharge as full-time Outreach Coordinator, we differ with the trial court and find that appellant, through her own deposition testimony regarding her acceptance of an offer of that position in May 1996 and her expressed willingness to work year around in that position, has produced sufficient competent summary judgment evidence to establish a prima facie case, albeit controverted by deposition testimony of the defendants, of age discrimination relative to her discharge from that position in September 1996: (1) Gates was discharged; (2) she was qualified for the position; (3) she was within the protected class at the time of discharge (over 40 years of age); and (4) she was replaced (i) by someone outside the protected class and (ii) by someone who was younger. See Stults, 76 F.3d at 656 n.2. However, we agree with the district court that Gates has failed to produce sufficient evidence from which a reasonable jury could conclude that appellees, proffered legitimate and nondiscriminatory reasons for the discharge (i.e. that the replacement worker was more qualified by experience and by education, would cost less money to employ, and was happy to work summers) were mere pretext. In the record presented for summary judgment purposes, Gates testified to a single statement made to her by Pevsner to the effect that "you would make too much money if I let you work twelve months." Gates also testified to her own conclusion that Pevsner "had hired someone younger at a lower salary to replace me."2* This evidence was not sufficient within the context of this case to create a reasonable inference that age

was a determinative reason for the employment decision.3* Id. at 657 (citing Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc)) . For example, seven of nine Outreach Coordinators employed by Forrest General at the time of the employment action were within the protected class; Gates had been offered other full-time and part-time employment opportunities; and, Gates continued to work full-time through November 1996 and part-time through June 1997. Moreover, employer decisions predicated upon salary considerations are not indicative of age discrimination. Armedariz v. Pinkerton Tobacco Co., 58 F.3d 144, 152 (5th Cir. 1995). Gates has failed to produce evidence from which it may be reasonably inferred that the defendants' proffered reasons were mere pretext.

Regarding appellant's First Amendment claim, we disagree with the district court that Gates's criticism of hospital co-employees

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2* Gates seeks to rely on her testimony quoted in her "record excerpts" to show that Pevsner said she could "hire a younger person for less money." Gates's testimony to this effect, However, is not part of the summary judgment record.

3* This was the only evidence of age discrimination attributed by Gates to Pevsner. Because age-related remarks are sufficient evidence of age discrimination only if uttered by the individual with authority over the employment decision at issue, See Brown v. CSC Logic, Inc., 82 F.3d 651, 655-56 (5th Cir. 1996), age-related statements by co-employees other than Pevsner, the supervising authority with control over personnel decisions such as hiring, firing, transfers, etc., are not relevant.

for patient abuse and sexual misbehavior was necessarily unprotected because it had not been made publicly or to the news media. However, even if it were assumed that her expressions were protected, Gates must also produce reasonably probative evidence that her speech caused the retaliatory employment decision about which she complains. See Jones v. Collins, 132 F.3d 1048, 1053 (5th Cir. 1998). Gates failed in this respect. Given the temporal remoteness of the "speech" (1994) from the "constructive discharge" (June 1997), as well as the intervening superlative personnel evaluations and offers of employment in various capacities, a reasonable trier of fact could not find a causal link between the two events. The same is true even if the May 1996 alleged discharge as Education Coordinator or the September 1996 alleged discharge as Outreach Coordinator are considered as the end points for causation analysis purposes. The expression at issue was too remote from the employment decisions complained of to support a reasonable inference of causation.

For the foregoing reasons, the district court grant of summary judgment in favor of appellees is AFFIRMED.

(2)

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Supplemental Appendix to Petition for Writ of Certiorari to the Supreme Court of the United States

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX B - MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT PURSUANT TO FED.R.CIV.P.56 DATED MAY 11, 1998

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

No. 2:97CV201PG

In RE:

TERESA ANN GATES

Plaintiff

FORREST GENERAL HOSPITAL and
VICKI FERNICOLA PEVSNER,
individually and officially

Defendants

MEMORANDUM

BEFORE THIS COURT is the Motion of the Defendants, Forrest General Hospital (hereinafter referred to as "Forrest General") and Vicki Fernicola Pevsner, for Summary Judgment pursuant to FED. R. Civ. P. 56(b). Plaintiff has filed a timely response, followed by Defendants' rebuttal. In this action, filed under the Age Discrimination in Employment Act, 29 U. S. C. § 62 1, et seq., Plaintiff contends that Defendants discriminated against her on the basis of her age, ultimately forcing her to resign from her position at Forrest General. In addition, she claims that Defendants violated her constitutional rights by failing to provide a hearing prior to the elimination of the position of Education Coordinator and her subsequent "involuntary

resignation." Plaintiff also claims that Defendants violated her First Amendment rights. After careful consideration of the pleadings, summary judgment evidence, briefs and "No arguments of counsel and the relevant legal authority, the Court finds that Defendants' Motion is well taken and should be granted.

FACTS AND PROCEDURAL HISTORY

In September 1991, Defendant Vicki Fernicola Pevsner (hereinafter referred to as "Pevsner"), the Administrator of Pine Grove, which is a division of Defendant Forrest General Hospital, contacted Plaintiff Gates about the possibility of Gates working full-time for the adolescent unit at Pine Grove. When Gates declined full-time employment, Pevsner suggested contractual employment. Pevsner indicated that she wanted Gates to supervise the newly-hired teacher for the adolescent unit and to assist in developing the educational foundation for the unit. Pevsner eventually persuaded Gates to work for Pine Grove part-time on a contractual basis. Gates began working for Pine Grove in October 1991.

Gates worked on average ten hours per week until May 1992. During this time, Pevsner encouraged Gates to work for Pine Grove on a full-time basis. Gates explained to Pevsner that she could not accept full-time employment because she and her husband, who were both educators, traveled to Arizona every summer for a business venture. Therefore, she could not work during the summer months. Pevsner told Gates to make a proposal for fulltime employment and she would consider it. Gates proposed that she work nine months of the year for a salary of $32,000, yet be considered a full-time employee year round, with all benefits, including retirement and health care. In July 1992, Gates received a letter dated July 3, 1992, from Jane Montgomery, Program Director for the unit, indicating that her proposal had been accepted. In particular, Montgomery stated that approval for the position of Education Coordinator "at the terms [Gates] requested" had been received. See Exhibit A attached to

Appendix B

Plaintiff's Memorandum Brief in Support of Her Response to Motion for Summary Judgment. The specific terms were salary of $19.35 per hour for nine months, with a "leave of absence each summer," and "full benefits." See Exhibit A attached to Plaintiff's Memorandum Brief in Support of Her Response to Motion for Summary Judgment. Gates began her employment as Education Coordinator at Pine Grove in August 1992.

As Program Director for the adolescent unit, Jane Montgomery was Gates's immediate supervisor. Pevsner, as the Administrator, was the supervisor of Montgomery.

During the latter part of 1993 or early 1994, Montgomery began having an affair with Alan Bougere, Program Director of an outpatient facility at Pine Grove. Montgomery shared details of the affair with Gates almost daily, which included details of their having sexual relations in their offices at Pine Grove. On several occasions, at the urging of Bougere, Montgomery asked Gates, to participate in a menage a trois with her and Bougere. Gates declined. Eventually, Pevsner learned of the affair, and in May 1994, questioned Gates about it. Gates told Pevsner what she knew about the affair, and that Montgomery had asked her to participate in a menage a trois. During their discussion about Montgomery and Bougere, Gates told Pevsner that she did not feel comfortable working with Bougere because of the menage a trois suggestion. The following day, Pevsner terminated Montgomery.

Prior to Pevsner learning of the affair, Pevsner told Gates that because the educational component was being moved to the Pine Grove facility, Gates would have to work with Bougere. As noted above, during their discussion about Montgomery and Bougere, Gates told Pevsner that she did not feel comfortable working with Bougere; however, Gates bad to work with him the remainder of the time that Bougere worked for the hospital, which was approximately nine to

twelve months.

In September 1994, an incident occurred in which the Patient Care Coordinator, Jennie Lou Eidson, pulled a fourteen year old patient's hair during a take-down. She also hit the child on the head. After the child calmed down, the child asked Eidson if she could go to the bathroom. Eidson responded that she should pick a corner. The child then explained that she had to defecate. Eidson again responded by telling the child to pick a corner.

Several hospital employees witnessed the incident. Some of the witnesses thought that the conduct of Eidson was abusive. Although Gates did not witness the entire incident, she agreed that it was abusive, based upon what the employees who witnessed the incident told her. She had also witnessed prior incidents where she thought Eidson had been abusive. Several days later, Gates was questioned about the incident. Gates admitted that, although she was not an eye-witness, she believed that Eidson's conduct was abusive. Pevsner, however, did not agree. Pevsner attempted to persuade Gates to change her opinion about the conduct being abusive. Pevsner's attempt was unsuccessful. Pevsner requested Gates's presence at a staff meeting the following morning in an attempt to build morale. At the meeting, however, Pevsner sided with Eidson and castigated those who believed the conduct was abusive. Pevsner admonished the staff to refrain from discussing the incident with anyone.

The following day, two of Gates's staff members, Shannon White and Debbie Jones, resigned because of their belief that management was condoning patient abuse. White wrote a scathing letter of resignation, criticizing the unit for the patient abuse, abuse to the staff, and Pevsner's behavior during the meeting. While White was discussing her resignation with Pevsner, Pevsner stated that she was considering firing Gates because of Gates's belief that Eidson's conduct was abusive. Pevsner ultimately blamed Gates for the

resignation letter from White. On or about December 8, 1994, Odie Kelly, the assistant administrator, told Gates that Pevsner had been offended by Gates's position regarding the patient abuse, and he told Gates that if she did not change her position, that Pevsner would get rid of her.

On May 15, 1996, Gates was removed from her position of Education Coordinator and given a position in marketing. Pevsner told Gates that the hospital eliminated the Education Coordinator position in an effort to trim the budget. Gates believed that the position would be full-time. However, Gates learned in early September 1996, after her summer leave, that the position was in fact part-time with no benefits. Gates also learned that in August 1996, the hospital hired as their full-time Outreach (marketing) Coordinator a woman under the age of 40, Jana Dunn. Gates also claims that Pevsner hired another woman, under the age of 40, to assume the responsibilities that Gates had had as Education Coordinator the day after Pevsner told Gates that the position had been eliminated.

Gates contends that the changes in her positions were a result of her reporting the sexual misconduct of Montgomery and Bougere and her opinion that the Eidson incident was abusive. She also claims that the changes were a result of her age. In support of this contention, Gates claims that Pevsner and Heather Gillis, Program Director during 1996, commented that they wanted to get rid of the "old regime" at the adolescent unit. She also claims that Gillis had commented that Gates should not participate in take-downs because she was too old. In addition, Gates claims that Gillis asked her as she was getting up to leave Gillis's office if her bones were creaking. Gates also claims that Pevsner had indicated that her salary would be too high if she were to work a full year.

On November 26, 1996, Gates charged Forrest General with age discrimination before the Equal Employment Opportunity Commission (" EEOC "). Unable to establish that a violation had

occurred, the EEOC provided Gates with a "Notice of Right To Sue" on February 26, 1997. Plaintiff timely filed a civil action, which was removed to this Court on June 3, 1997. This matter is before the magistrate judge by consent of the parties pursuant to 28 U.S.C. § 636(c). Forrest General contends that Gates has failed to demonstrate the existence of material facts from which a jury could find age discrimination and violation of due process rights, and seeks judgment as a matter of law under FED. R. Civ. P. 56.

Discussion

FED. R. CIV. P. 56 permits any party to a civil action to move for a summary judgment upon a claim, counterclaim, or cross-claim as to which there is no genuine issue of material fact and upon which the moving party is entitled to prevail as a matter of law. In effect, Rule 56(c) argues that as a matter of law, upon admitted or established facts, the moving party is entitled to prevail. Summary judgment "is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. " *Whitaker v. Coleman*, 115 F.2d 305 (5th Cir. 1940). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,325, 106 S. Ct. 2548,2554, 91 L.Ed.2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. Id. at 324-25, 106 S.Ct. at 253-54. The non-moving party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,256-57, 106 S.Ct. 2505,2514, 91 L.Ed.2d 202 (1986).

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Discrimination in Employment

The Age Discrimination in Employment Act provides that "[i]t shall be unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C.S. § 623(a)(1) (Law. Co-op. 1990). To prevail on a claim of age discrimination, "a plaintiff must prove intentional discrimination." *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149 (5th Cir. 1995), rehg denied, cert. denied, 516 U.S. 1047, 116 S. Ct. 709, 133 L.Ed.2d 664 (1996). When a plaintiff is unable to present direct evidence of discrimination, he or she may "create a rebuttable presumption of discrimination by presenting a prima facie case." *Armendariz*, 58 F.3d at 149, citing *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 118 (5th Cir. 1993).

A prima facie case consists of evidence that a plaintiff: "(1) was discharged; (2) was qualified for the position; (3) was within the protected age class--over 40-- at the time of discharge; and (4) was replaced by a younger person, or a person outside the protected age class, or otherwise was discharged because of his or her age." *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 n.2 (5th Cir. 1996). If the plaintiff establishes a prima facie case of discrimination, "the burden of production shifts to the defendant to establish a legitimate, nondiscrimimtory reason for its decision." *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149 (5th Cir. 1995), rehg denied, cert. denied, 516 U.S. 1047, 116 S. Ct. 709, 133 L.Ed.2d 664 (1996), citing *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). An employer meets its burden of production by proffering admissible evidence of an explanation that would be legally sufficient to justify a judgment for the employer. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993); *Guthrie v. Tifco Industries*, 941 F.2d 374 (5th Cir. 1991). Once an

employer articulates a legitimate, nondiscriminatory reason for its action, the burden shifts to the plaintiff to produce admissible evidence which demonstrates that the employer's reason is a pretext for prohibited discrimination. *Barrow v. New Orleans S. S. Assn*, 10 F. 3d 292 (5th Cir. 1994); *Purcell v. Sequin State Bank and Trust Co.*, 999 F.2d 950, 957 (5th Cir. 1993). In situations where an employer's reasons are "unpersuasive, or even obviously contrived," plaintiff must nevertheless prove that the proffered reasons were but a pretext for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 523, 113 S.Ct. at 2756.

Because the Court is ruling on a summary judgment motion under FED. R. Civ. P. 56, it need not determine whether plaintiff can actually prove pretext and discriminatory intent. A Court considering a summary judgment motion must decide whether plaintiff's facts, if believed, would prove that, more likely than not, the employer fired the employee because of her age. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d at 959 n.8. The Plaintiff must produce sufficient evidence to create "a reasonable inference that age was a determinative reason for the employment decision." *Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996), citing *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc).

Plaintiff claims that the Defendants discriminated against her on the basis of her age by terminating her position as Education Coordinator, and transferring her to another position. In addition, she claims that the Defendants discriminated against her on the basis of her age a second time by hiring a younger woman to replace her as Outreach Coordinator.

ADEA Claim Against Defendant Pevsner:

Plaintiff claims that Defendant Pevsner, in her individual and official capacity, discriminated against her on the basis of age. As noted above, Pevsner was a supervisor of Gates. However, "the

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ADEA provides no basis for individual liability for supervisory employees." *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996). Therefore, Plaintiffs ADEA claim against Defendant Pevsner in her individual capacity must fail; consequently, Pevsner is entitled to judgment as a matter of law on this claim.

Elimination of Gates's Position as Education Coordinator:

Gates claims that Defendants discriminated against her on the basis of age by removing her from her position as Education Coordinator. She contends that the duties of the position of Education Coordinator were assumed by other women who were under the age of 40. In support of her contention, she claims that, as noted above, stray remarks were made regarding her age.

Plaintiff Gates has presented no direct evidence of age discrimination; therefore, the Court must determine if she can establish a prima facie case. As noted above, Gates must establish (1) that she was discharged; (2) that she was qualified for the position; (3) that she was within the protected class--over 40--at the time of discharge; and (4) that she was either (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of her age. It is undisputed that Gates can establish the first three elements that she was discharged, was qualified for the position of Education Coordinator, and that she was within the protected class. However, the dispute arises with regard to the fourth element. Plaintiff claims her duties were assigned to women who were younger and not within the protected class, and that she was discharged because of her age.

Defendants, however, deny both that Plaintiff was replaced at all. Although Defendants do not deny that some of Plaintiffs duties were assumed by a younger woman, the Defendants do deny that Plaintiff was "replaced." In support of their contention that Plaintiff was not replaced, Defendants indicated that the work assigned to the

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Therapist Coordinator for the duties of the Education Coordinator involves only one to two hours per week. To be considered "replaced," another employee must be "hired or reassigned to perform the plaintiff's duties." *Valle v. Johnson Controls World Services, Inc.*, 957 F. Supp. 1404, 1413 n.5 (S.D. Miss. 1996), citing *Barnes v. Gen Corp Inc.*, 896 F.2d 1457, 1465 (6th Cir.) (citation omitted), cert. denied, 498 U.S. 878, 111 S.Ct. 211, 112 L.Ed.2d 171 (1990). However, when another employee is merely "assigned to perform the plaintiffs duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work," the employee cannot be considered to have been "replaced." *Valle v. Johnson Controls World Services, Inc.*, 957 F. Supp. at 1413, citing *Barnes v. Gen Corp Inc.*, 896 F.2d at 1465. Because Plaintiff Gates's duties were assigned to another employee who performed other duties as a Therapist Coordinator, Gates cannot be considered as having been replaced.

Because Gates was neither "replaced" by someone outside the protected class, nor "replaced" by someone younger, Gates must prove that Defendants otherwise discharged her because of her age. The only evidence Plaintiff sets forth to prove that she was discharged because of her age is remarks made regarding her age by two people, both of whom were in supervisory positions. "[W]hen age-related comments are 'vague and remote in time and administrative hierarchy, they are no more than "stray remarks," which are insufficient to establish discrimination.'" *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992) quoting *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991), cert. denied 503 U.S. 908, 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992). However, age-related "remarks may serve as sufficient evidence of age discrimination if the offered comments are: (1) age related; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." *Brown v. CSC Logic, Inc.*, 82 F. 3d 651, 655 (5th Cir. 1996) (citation omitted). In addition, for the comment "to be

probative of an employer's discriminatory intent, it must be direct and unambiguous."

Two of the comments to which Gates refers were age-related. The comment by Pevsner and Gillis that they wanted to get rid of the "old regime," however, does not necessarily connote an age relation. They could have been referring to employees, young and old, that had been employed for several years, and therefore, the comment is too indirect and ambiguous. The comment by Pevsner that Gates's salary would be too high if she were to work year-round was also not necessarily age related because level of salary is not necessarily greater for an employee that is older.

Regarding the remaining factors to consider in determining whether the comments are sufficient evidence, the comments were somewhat proximate in time to the termination because apparently the comments were made during 1996, prior to her termination in May. In addition, two of the comments were made by Defendant Pevsner, who had authority over the employment decision. The other comments were made by Gillis, who was the Program Director at the time, and had supervisory authority over Gates. However, Gates cannot show that those comments were related to the employment decision to eliminate the position of Education Coordinator. The comments were simply too vague to be related to the elimination of the position. For instance, reference to getting rid of the "old regime" is not related to the elimination of Gates's position. The reference to Gates's bones creaking also had no relation to the employment decision, and was too ambiguous to be probative of discriminatory intent. As evidence that the comments did not relate to an employment decision to terminate Gates because she was too old, Defendants actually offered Gates alternative employment at the time of the elimination of her position. Therefore, the comments do not constitute sufficient evidence of age discrimination. Because Plaintiff has failed to set forth sufficient evidence to establish each of the elements of a prima facie case of age discrimination, she has failed to make a prima facie

showing of discriminatory animus.

Assuming arguendo, that Gates made the requisite prima facie showing, she has offered no evidence to rebut Defendants' "legitimate nondiscriminatory reason" for the elimination of the position of Education Coordinator. As the Defendants noted in their Memorandum, as the program at Pine Grove became more established, and because the length of a patient's stay shrunk, the responsibilities of the Education Coordinator declined to such an extent that the position could not longer be justified. In addition, the "teachers had become more established in their work, the programs were shortened, and there was simply no need for a separate Education Coordinator position." Memorandum in Support of Defendants' Motion for Summary Judgment, p. 6. "[T]he elimination of positions, and reductions in force in general, are legitimate reasons for adverse employment actions." *Newton v. Southern Methodist Univ.*, No. 3:96-CV-2881-R, 1998 WL 133063, *3 (N.D. Tex. Mar. 19, 1998), citing *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 150 (5th Cir. 1995) (citing *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957-58 (5th Cir. 1993); *Hanchey v. Energas Co.*, 925 F.2d 96, 98 (5th Cir. 1990)). Therefore, Defendants' decision constitutes a nondiscriminatory reason for its employment decision.

Because the Defendants have met their burden in articulating a legitimate, nondiscriminatory.reason for their decision, the burden shifts to Plaintiff to demonstrate pretext. The Plaintiff must prove that the Defendants' reasons are a pretext for unlawful discrimination either by showing that a discriminatory reason more likely motivated the defendants or by showing that the defendants' reason is unworthy of credence. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). However, pretext alone is not enough. "[E]ven if the employee proves that the employer's nondiscriminatory reason is pretextual, the plaintiff must prove that an unlawful discriminatory intent motivated the employer's action. *Marcantel v. State of Louisiana, Department of Transportation and*

Development, 37 F. 3d 197, 200 (5th Cir. 1994). For Plaintiff to prevail, the summary judgment proof must consist of more than a mere refutation of the employer's legitimate nondiscriminatory reason. *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th Cir. 1993). The employee's subjective belief of discrimination, however genuine, cannot be the basis of judicial relief. *Portis v. First Natl Bank of New Albany, Mississippi*, 34 F.3d 325, 329 (5th Cir. 1994); *Waggoner v. City of Garland*, 987 F.2d 1160, 1163 (5th Cir. 1993). Additionally, conclusory allegations, speculation and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden. *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139 (5th Cir. 1996).

Plaintiff has failed to produce admissible evidence of pretext. Plaintiff ostensibly argues that her position as Education Coordinator was eliminated so that the duties could be assigned to a younger woman not in the protected class. However, her supposition is unsupported by summary judgment evidence. The duties assigned to the younger employee only required one to two hours per week, which certainly supports the Defendants' contention that the position was not justified. Moreover, Defendants offered her other positions at Pine Grove so that she could continue her employment. "'The ADEA was not intended to be a vehicle for judicial second-guessing of business decisions, nor was it intended to transform the courts into personnel managers.'" *Waggoner v. City of Garland*, 987 F.2d 1160, 1165 (5th Cir. 1993), quoting *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 647 (5th Cir. 1985). There is simply no evidence to support Plaintiff's claim that her position was eliminated because of her age. Accordingly, Defendants' Motion for Summary Judgment on Plaintiffs claim of age discrimination with regard to the Defendants' elimination of the position of Education Coordinator should be granted.

Transfer of Gates to Part-time Outreach Coordinator:

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Gates was transferred from her position as Education Coordinator to the position of part-time Outreach Coordinator. As noted above, Gates contends that she had been offered a full-time outreach position prior to taking her leave to go to Arizona for the summer. When she returned, however, only a part-time position was available. She contends that the position was given to a younger woman, Jana Dunn. Defendants, on the other hand, contend that they offered Gates either a part-time position of Outreach Coordinator, or a position as a full-time teacher. Apparently, Defendant Pevsner spoke with Gates about the full-time marketing position prior to Gates leaving in May. At that time, Pevsner was merely considering the position as a full-time position. However, after Pevsner decided to hire a full-time Outreach Coordinator. and after further consideration of Gates for the position, Pevsner decided that the full-time position should be offered to someone else because Gates always took leave during the summer. The positions offered to Gates by the Defendants would have allowed her to take leave during the summer months to travel to Arizona. Gates did not inform Pevsner until after her return from Arizona in September that she would be willing to work summers. At that time, however, Pevsner had already interviewed Dunn for the position.

Because Plaintiff does not support her claim with direct evidence, she may prove her claim by establishing a prima facie case of discrimination. She must therefore establish that (1) she was discharged; (2) she was qualified for the position; (3) she was within the protected class at the time of discharge; and (4) she was either (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of her age. Although Plaintiff contends that she meets all of the requirements necessary for a prima facie case of discrimination, Defendants contend that she has wholly failed to establish all of the elements. First, Defendants contend that she was not discharged from the position as full-time Outreach Coordinator because they never offered her the position. Second, although she may have been qualified, she was not

willing to work summers, which was a requirement for the position. Of course Plaintiff contends that she told Pevsner she would work summers, but this was only after her return in September. Third, although she was in the protected class, she again was not discharged from the position. Lastly, although the position was offered to and accepted by someone outside the protected class and younger, Gates was not discharged from the position.

Plaintiff again sets forth as evidence, to prove her claim of age discrimination, stray remarks made by individuals in supervisory positions. However, as discussed above, the Court is of the opinion that those comments are stray remarks insufficient to support a claim of age discrimination.

Plaintiff also sets forth as evidence that Defendant Pevsner told her that she would make too much money if she worked full-time. However, decisions by the employer based upon salary is not indicative of discrimination based upon age. *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 152 (5th Cir. 1995). Therefore, Plaintiff has failed to set forth sufficient evidence to establish the elements of a prima facie case of age discrimination. Moreover, Plaintiff has failed to offer any evidence to prove that she was actually hired for the position of full-time Outreach Coordinator. As noted above, conclusory allegations, speculation and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden. *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139 (5th Cir. 1996). Consequently, Plaintiff has failed to make a prima facie showing of discriminatory animus.

Even assuming that Gates made the requisite prima facie showing, she has offered no evidence to rebut Defendants' "legitimate nondiscriminatory reason" for hiring Jana Dunn for the position of Outreach Coordinator. Defendant Pevsner interviewed Dunn for the position during August. Gates returned in September and notified Pevsner that she would be willing to work summers. Pevsner believed

that Dunn was simply more qualified for the position. Even assuming that Plaintiffs theory is correct, an employer's desire to replace an employee with one which is better qualified does not necessarily constitute employment discrimination. Even if employees are performing their jobs adequately, an employer is not prohibited "from replacing [them] with [those] who he subjectively believes will do a better job." *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 60 (5th Cir. 1992) quoting *Elliot v. Group Medical Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983) cert. denied 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984).

Because Defendants' decision to hire Dunn rather than Gates for the position of Outreach Coordinator constitutes a nondiscriminatory reason for its employment decision, the burden shifts to Plaintiff to demonstrate pretext. Plaintiff argues that the Defendants "replaced" her with a younger woman. However, at the time of the Defendants' hiring of Dunn, seven of the nine Outreach Coordinators were within the protected class. In addition, Plaintiff's only evidence of age discrimination is stray remarks regarding her age and the fact that her salary would be higher if she were to work during the summer months. This evidence is insufficient to prove discriminatory intent. Plaintiff has failed to present evidence that the Defendants' reason was mere pretext. More importantly, she has failed to demonstrate facts from which a jury could conclude that unlawful discriminatory intent motivated Defendants' decision to terminate her employment. Plaintiff must do more than cast "doubt on the reasonableness of the employer's action; otherwise, the law would be converted to a 'just cause' provision for the protected class of employees, an effect that Congress clearly did not intend." *Hanchey v. Energas Co.*, 925 F.2d 96, 98 (5th Cir. 1990), citing *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1505 & 1508 n.6 (5th Cir. 1988). Therefore, Plaintiff has failed to support her position with summary judgment evidence that the Defendants discriminated against her on the basis of age.

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Gates's Claims Pursuant to Section 1983:

Plaintiff contends that Defendants deprived her of property and liberty interests without due process of law. She contends that she was entitled to a hearing prior to the elimination of her position as Education Coordinator, and prior to the Defendants' decision to "replace" her with a younger woman for the position of Outreach Coordinator.

"The due process clause provides a mechanism by which a persons [sic] property or liberty may not be permanently diminished or abrogated without first being accorded that procedural protection designed to ensure a principled and even-handed examination of the basis for any such deprivation." *Martin v. Memorial Hosp. at Gulfport*, 130 F.3d 1143, 1147 (5th Cir. 1997), citing *Cleveland Board of Educ. V. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1943, 84 L.Ed.2d 494 (1985); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972). "By its own terms, the due process clause is not implicated unless an individual's property or liberty interests are threatened. *Martin v. Memorial Hosp. at Gulfport*, 130 F.3d at 1147.

Property Interest:

To prevail on her claim that she was deprived of procedural due process, Plaintiff must first prove that she had a constitutionally protected property or liberty interest in continued employment. *Frazier v. Garrison LS.D.*, 980 F.2d 1514, 1528 (5th Cir. 1993), citing *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "A property interest for the purpose of due process claims is 'an entitlement grounded in state law, which cannot be removed except "for cause."'" *Brown v.*

City of Galveston, 870 F. Supp. 155, 158 (S.D. Tex. 1994), quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982). Plaintiff contends that she had a property interest in continued employment with Defendant Forrest General in the form of an employment contract based upon two documents. One document was a letter to Plaintiff, prior to her beginning employment with Defendant Forrest General, confirming certain terms of her employment. The other document, although entitled "Amendment to Employment Contract and Authorization to Purchase Annuity Contract," is an annuity contract prepared by Travelers Insurance Company. This Court, in its Memorandum Opinion Granting Defendants' Motion for Partial Summary Judgment entered on December 3, 1997, found that Plaintiff Gates's employment was at-will. In responding to that Motion for Partial Summary Judgment, however, Gates only presented the document confirming terms of her employment. Even considering the annuity document, these documents do not support Gates's contention that she had an employment contract.

Gates also contends that because of promises to her regarding continued employment and her supervisor's confirmation of their understanding that she would always have summer leave, she had an employment contract. The Court does not agree. As previously decided by this Court, Plaintiff did not have an employment contract. Therefore, Plaintiff's employment could be terminated for any reason at any time. Because her employment was at-will, she did not possess a constitutionally protected property interest in continued employment. *See Brown v. City of Galveston*, 870 F. Supp. 155, 160 (S.D. Tex. 1994). Consequently, Defendants have not deprived Gates of procedural due process with regard to a property interest. Plaintiff also claims that her Fifth Amendment property rights have been violated. However, because Plaintiff did not have a property interest in continued employment, this claim also fails.

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Liberty Interest:

Plaintiff also claims that Defendants deprived her of a liberty interest. With regard to that claim, she specifically contends as follows:

> Plaintiff had the right to go to work every day for this public institution and not be castigated, humiliated , embarrassed, and violated in the manner in which she was. She had the right to speak out upon issues of public concern such as assaulting children and illicit sexual activity on the work premises. Thus, Plaintiffs liberties were specifically impinged. She never received a hearing. Indeed, the Hospital never once gave her an option of having any kind of hearing.

Memorandum Brief in Support of Plaintiff's Response to Motion for Summary Judgment, p. 26.

"' [A]n individual's liberty interest ... is viewed as including an individual's freedom to work and earn a living and to establish a home and position in one's community.'" *Martin*, 130 F.3d at 1147 (citations omitted). "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure.'" *Martin*, at 1147 (citations omitted). The Court is of the opinion that the Defendants did not violate a constitutionally protected liberty interest of Gates. Defendants neither effectively barred her from pursuing work in her career field, nor injured her professional reputation. *See Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1214 (5th Cir. 1989), citing *Phillips v. Vandygriff*, 711 F. 2d 1217, 1222 (5th Cir. 1983), clarified on reh'g, 724 F. 2d 490, cert. denied, 469 U.S. 821, 105 S.Ct. 94, 83 L.Ed.2d 40 (1984). Because Defendants did not violated Gates's liberty interest, she was not entitled to a hearing.

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First Amendment Claim

Gates also claims that Defendants violated her First Amendment rights by preventing her from speaking out regarding patient abuse and illegal sexual activity at Pine Grove. She contends that Pevsner told her that there would be "dire consequences" if she made complaints about the patient abuse. As discussed above, both the patient abuse and the sexual activity occurred in 1994. Gates also claims that the Defendants retaliated against her for reporting the activity, and threatened her so that she would not continue reporting the activity that occurred in 1994.

"[T]he First Amendment precludes retaliation against a public employee based upon her expression only if that expression satisfies two criteria. First, the expression must relate to a matter of public concern. Second, the employee's interest in 'commenting upon matters of public concern' must outweigh the public employer's interest 'in promoting the efficiency of the public services it performs through its employees.' If a public employee establishes that her expression is protected by meeting the above two criteria, she must still prove that her expression caused the retaliatory act of which she complains in order to establish a violation of the First Amendment." *Jones v. Collins*, 132 F.3d 1048, 1053 (5th Cir.), reh'g denied, 137 F.3d 1353 (5th Cir. 1998) (citations omitted).

Gates did not publicly report the two the incidents she contends were illegal. When questioned by her supervisor about the sexual activity, Gates relayed the facts and her opinion of the relationship. In addition, when internal personnel conducted an investigation of the patient abuse, again Gates conveyed the facts about which she had personal knowledge. The Court is of the opinion that Gates's comments regarding the factual scenarios of the incidents in response to questions by supervisory and other personnel were not First Amendment protected speech. "'Every § 1983 case relating to workplace freedom of speech, from Connick on down, discusses the

actual speech engaged in by the employee. [Plaintiff] not only admits, she insists that she did not provide any information to the press. [Plaintiff provides no authority for the proposition that her free speech rights are deprived in violation of § 1983 when the speech at issue admittedly never occurred.'" *Jones*, 132 F.3d at 1053-54, quoting *Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990). Because Gates did not engage in any speech protected by the First Amendment, the Defendants are entitled to judgment as a matter of law on this claim.

Constructive Discharge:

Gates claims that Defendants constructively discharged her by making her working conditions intolerable. Gates also states, in her Memorandum Brief, p. 19, that she did not allege constructive discharge as a separate cause of action, but instead as a factor to take into account in considering damages. Because the Court is granting Judgment as a Matter d Law on all of Plaintiff's claims, she is not entitled to damages. Therefore, the Court need not address this issue.

Conclusion.

After careful consideration of the Defendants' Motion for Summary Judgment, the Plaintiff's response, Defendants' rebuttal, the pleadings, summary judgment evidence and the relevant authority, it is the opinion of the Court that Plaintiff has failed to make a *prima facie* showing that the elimination of her position and reassignment were age related. Additionally, Plaintiff has failed to establish the existence of material facts upon which a jury could conclude that Defendants' stated reasons for the elimination of Plaintiff's position and reassignment are pretextual and that unlawful discriminatory intent motivated the employer's action. Plaintiff has also failed to prove that she had constitutionally protected property and liberty interests in continued employment. In addition, Plaintiff has failed to prove that the Defendants violated her First Amendment rights. Consequently, Defendants are entitled to judgment as a matter of law on all claims.

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IT IS THEREFORE ORDERED AND ADJUDGED, that for the reasons cited above, the Motion of the Defendants, Forrest General Hospital and Vicki Fernicola Pevsner, for Summary Judgment pursuant to FED. R. Civ. P. 56(b) should be, and is hereby GRANTED.

SO ORDERED AND ADJUDGED this the 11th day of May, 1998.

LOUIS GUIROLA, JR.
U.S. MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
JUN 05 2000
CLERK

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No. 99-1727

In The

Supreme Court of the United States

October Term, 1999

TERESA ANN GATES

Petitioner,

vs.

FORREST GENERAL HOSPITAL, VICKI FERNICOLA PEVSNER

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner, Teresa Gates, filed a complaint against Respondents, Forrest General Hospital and Vicki Pevsner, in Forrest County, Mississippi Circuit Court on May 7, 1997. Respondents removed the suit to federal court on June 2, 1997. Petitioner alleged in her suit that she was employed as the Education Coordinator at Pine Grove Recovery Center (a division of Forrest General) and was then "replaced" by a less qualified female under the age of 40. (R. pp. 6-7). Petitioner asserted that Forrest General and Vicki Pevsner willfully and/or negligently discriminated against her on the basis of her age, that her age was at least a contributing factor in her being terminated from the Education Coordinator position and that she was "compelled to perform in a part-time job." (R. p. 7, ¶7). Petitioner also alleged that she was "replaced" because she was a whistle-blower (R. p. 7, ¶8); was a victim of detrimental reliance, promissory estoppel, and/or equitable estoppel (R. pp. 7-8); had a contract that was breached by Respondents (R. p. 8, ¶10); and was the victim of intentional infliction of emotional distress. (R. p. 8, ¶11).

Petitioner filed an amended complaint on August 29, 1997, to add as an "alternative contention" that she was deprived of specific property interests and constitutional rights and/or privileges secured by the United States Constitution and the Mississippi Constitution. She also alleged that she was deprived of her liberty interests and that her First, Fifth and Fourteenth Amendment Rights were violated, all in violation of 42 U.S.C. §1983. (R. p. 59).

Pursuant to a motion for partial summary judgment filed by Forrest General and Vicki Pevsner on August 26, 1997, the District Court dismissed Petitioner's breach of contract claim, finding that Petitioner was employed at will under Mississippi law and, thus, had no breach of contract claim. The Court also

dismissed Petitioner's tort claims of negligence, detrimental reliance, promissory estoppel, equitable estoppel and intentional infliction of emotional distress and the whistle-blower claim because Petitioner failed to follow the proper notice procedures under Miss. Code Ann. §11-46-11(1). (R. pp. 86-92). Plaintiff subsequently refiled these latter claims in state court, and they are not the subject of her Petition for Writ of Certiorari.

The claims remaining before the district court were Petitioner's age discrimination claim, §1983 and constitutional claims and a constructive discharge claim. On February 4, 1998, Respondents filed a motion for summary judgment on these remaining claims.

On May 11, 1998, Magistrate Judge Louis Guirola, Jr.[1] issued a judgment, memorandum opinion and order granting Respondents' motion for summary judgment in its entirety. (R. pp. 359-382). On May 21, 1998, Petitioner filed a motion for reconsideration. (R. pp. 389-394). On June 23, 1998, Judge Guirola denied the motion. (R. pp. 402-403).

Petitioner filed a timely notice of appeal to the Fifth Circuit on July 15, 1998. (R. pp. 405-406). On September 24, 1999, the Fifth Circuit affirmed the decision of the lower court. (App. 1a-4a). Petitioner filed a request for a panel hearing and a rehearing *en banc* on October 8, 1999, which were denied by the Fifth Circuit on November 3, 1999. Petitioner subsequently filed this Petition for Writ of Certiorari.

As detailed below, there is no cause for this Court's review of Petitioner's contentions which now have been

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[1]Pursuant to 28 U.S.C. §636(c) and Fed. R. Civ. Proc. 73, the parties consented to proceed before the Magistrate Judge.

rejected by the District Court and by the Fifth Circuit. Petitioner misstates and mischaracterizes the lower courts' rulings in an attempt to create a legal issue worthy of certiorari review by this Court. The lower courts properly applied the law, therefore there is nothing for this Court to review.

A. Petitioner Misstates the Fifth Circuit Holding Regarding Her *Prima Facie* Case of Age Discrimination

In the Petition, Petitioner claims that the Fifth Circuit "conceded" that she established a *prima facie* case of age discrimination but, despite this fact, the court affirmed summary judgment for Respondents. Petitioner misstates the Fifth Circuit's holding. Petitioner's Age Discrimination in Employment Act (ADEA) claim is premised upon her alleged discharge from the Education Coordinator position and her failure to be selected for the Outreach Coordinator position at Forrest General. Petitioner claims that she was discharged in May 1996 from her position as Education Coordinator and that this discharge was based on her age. Not only did the Fifth Circuit not concede that Petitioner made out a *prima facie* case with regard to her discharge from this position, that court found this claim to be "without merit." (App. 2a).

Specifically, the Fifth Circuit found that the Petitioner's Education Coordinator position was eliminated and that only a small part of Petitioner's duties as Education Coordinator were assigned to another employee who was already performing the duties of the Therapy Coordinator. Therefore, Petitioner cannot be considered as having been replaced by another employee. *Barnes v. GenCorp., Inc.*, 896 F.2d 1457, 1465 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990)

(person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties) (App. p. 2a).

The Fifth Circuit also addressed Petitioner's claim that she was not chosen for the position of Outreach Coordinator and that this decision was unlawfully based on her age. While it is true that the Fifth Circuit found that Petitioner produced enough evidence to establish a *prima facie* case with regard to this claim, the Fifth Circuit upheld the District Court's decision to grant summary judgment to Respondents because Petitioner failed to produce sufficient evidence to allow a reasonable jury to conclude that Respondents' legitimate nondiscriminatory reasons for the selection of another individual for the Outreach Coordinator position were mere pretext. (Appendix p. 2a-3a).

B. Petitioner Misstates the Fifth Circuit's Holding Regarding Her First Amendment Claim

Petitioner also claims that the Fifth Circuit conceded that her criticism of Hospital co-employees was "protected" speech. Again, Petitioner distorts the facts. What the Fifth Circuit actually stated was that it disagreed with the District Court that Petitioner's criticism of Hospital coemployees was "necessarily unprotected" because it had not been made publicly or to the news media. (emphasis added) (App. p. 3a - 4a).

Petitioner also fails to mention that the Fifth Circuit further emphasized that even if it were to assume that Petitioner's speech was protected, Petitioner also had the burden to prove that this "protected" speech caused the alleged retaliatory

employment decision about which she complained; Petitioner failed to meet this burden. (App. p. 4a). The "speech" occurred in 1994, but Petitioner's alleged constructive discharge took place in 1997. In between, Petitioner received "superlative" personnel evaluations and offers of employment within the Hospital in various capacities. (App. 4a). Therefore, the Fifth Circuit concluded that a reasonable trier of fact could not find a causal link between the "speech" and the constructive discharge. Even if the speech was protected, it was just too remote from the employment decisions which were the subject of Petitioner's complaint. (App. p. 4a).

C. Petitioner Relies on Evidence That Is Not Contained in the Record

In her Petition, Petitioner claims that she "offered evidence that she was specifically told by her immediate supervisor that the Hospital wanted 'someone younger at a lower salary to replace her.'" (Petition p. 5). First of all, the Fifth Circuit held that such evidence was not sufficient within the context of this case to create a reasonable inference that age was a determinative reason for the employment decision. More importantly, the Fifth Circuit properly rejected Petitioner's attempt to rely on those alleged statements because Petitioner never made it part of the summary judgment record in the District Court. (App. p. 3a). "Gates seeks to rely on her testimony quoted in her 'record excerpts' to show that Pevsner said she could 'hire a younger person for less money.' Gates' testimony to this effect, [h]owever, is not part of the summary judgment record." (App. 3a ftnt.2). Petitioner now seeks to use this same evidence to obtain a Writ of Certiorari. Like the Fifth Circuit below, this Court should reject this "evidence" because it is not part of the

record.

REASONS FOR DENYING THE WRIT

1. The Courts Below Properly Followed Supreme Court Precedent in Deciding Petitioner's Age Discrimination Claims.

Petitioner claims that she made a *prima facie* case of age discrimination and, because of that, she should be able to bypass a motion for summary judgment and take her case directly to a jury. Petitioner attempts to characterize the Fifth Circuit as taking a contrary position regarding summary judgment in age discrimination cases from the positions taken in the Second, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits as well as the District of Columbia. (Petition pp. 6-7).

In analyzing Petitioner's age discrimination claims, the Fifth Circuit and District Court merely applied the burden-shifting analysis established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973) and later clarified in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094 (1981) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 525, 113 S.Ct. 2742, 2756 (1993). This analysis is properly applied when a plaintiff can produce no direct evidence of discrimination. The District Court found, and the Fifth Circuit affirmed its finding, that Petitioner presented no direct evidence of age discrimination. (App. 14a).

First, the plaintiff must establish a *prima facie* case of age discrimination. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999). This burden is not onerous and may be satisfied with only a minimal showing. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1094. If the plaintiff is able to establish a

prima facie case, this merely raises a presumption of discrimination, which the defendant must rebut with a legitimate nondiscriminatory reason for the challenged employment action. *Hicks*, 509 U.S. at 525, 113 S.Ct. at 2756; *Bauer*, 169 F.3d at 966. If the defendant articulates such a reason, the burden shifts back to the plaintiff who must prove by a preponderance of the evidence that the defendant's nondiscriminatory reason was a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802-804, 93 S.Ct. at 1824-1825; *Bauer*, 169 F.3d at 966. The plaintiff bears the burden of persuasion throughout the case. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093.

The Courts below merely followed this Court's analysis in requiring Petitioner to prove that Respondents' nondiscriminatory reason was a pretext for discrimination. There is absolutely no precedent to support Petitioner's contention that once a plaintiff establishes a *prima facie* case she gets to skip over the rest of the analysis and go directly to a jury. The District Court and the Fifth Circuit properly found in favor of Respondents' motion for summary judgment because Petitioner failed to overcome her burden of proving that Respondents intentionally discriminated against her on the basis of her age.

This comports with long established precedent set by this Court and followed by all lower courts. Contrary to Petitioner's suggestion, there is no conflict among the lower courts regarding the fact that a *prima facie* case is but one step in the overall analysis of a discrimination claim. It is not, as Petitioner claims, the final step before proceeding to a trial before a jury.

2. The Fifth Circuit Properly Applied the Summary Judgment Standard, and There Is No Conflict Among the Circuits Regarding This Standard

Petitioner's claim that the burden to overcome a motion for summary judgment is "much heavier in the Fifth Circuit" is ludicrous. The standard for overcoming a motion for summary judgment in the Fifth Circuit is the same as in every other circuit, no more and no less. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Boyd v. State Farm Ins. Companies*, 158 F.3d 326, 329 (5th Cir. 1998); *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1412 (5th Cir. 1993) *cert. denied*, 119 S.Ct. 1357, 143 L.Ed. 518.

Such judgment is proper when the summary judgment record, viewed in the light most favorable to the nonmovant, establishes there is no material fact issue. *Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 266 (5th Cir. 2000); *Drake v. Advance Const. Serv. Inc.*, 117 F.3d 203, 204 (5th Cir. 1997). When the nonmoving party has the burden of proof at trial, the moving party need only alert the court that there is an absence of evidence in support of one or more elements to the plaintiff's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993). Once the movant has made the proper showing, the nonmoving party has the burden to produce sworn evidence to rebut the motion. *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Page v. Delaune*, 837 F.2d 233, 239 (5th Cir. 1988); *C.F. Dahlberg Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir. 1988).

The Fifth Circuit applied the proper standard when it affirmed the District Court's granting of summary judgment. When Petitioner failed to overcome the *McDonnell Douglas* burden, the Courts below properly found that there was no genuine issue of material fact and Respondents were entitled to judgment as a matter of law.

CONCLUSION

Respondents respectfully request this Court to deny the Petition for the foregoing reasons.

Dated: May 30, 2000

Respectfully submitted,

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